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Enterprise Bargaining and Agreements under the Workplace Relation Act, 1996 and their Appreciation to the NSW Coal Mining Industry

J Whale¹

ABSTRACT

The Australian industrial relations system is in a state of constant change. We are undergoing a transformation from a compulsory arbitration and an award based system to one which is fundamentally rooted in the concepts of enterprise bargaining. This is true both at the State and Federal level. The structural changes which facilitate the movement away from the predominance of Awards to enterprise agreements has been fostered by both sides of the political spectrum and is a cornerstone of their respective industrial relations platforms.

In determining what form or combination of forms of industrial instrument(s) should apply to the individual enterprise, employers must have regard to the viability and sustainability of each form in the changing industrial climate. In particular employers should have regard to the needs and agendas of their employees and unions which may purport to represent them.

This paper traces the Federal legislative changes and fleshes out the industrial instrument options available to parties under the Workplace Relations Act, 1996 and gives an industrial relations practitioner's perspective upon the viability of those options and how they match contemporary human resource practice.

INTRODUCTION

Whilst the Workplace Relations Act, 1996 ('the Workplace Relations Act') is the first Liberal/National Party coalition Government attempt at addressing the balance between organised labour and employers its' fundamental structure is rooted in the concept of decentralised industrial relations and collective bargaining at the enterprise level which were embraced by the Hawke and Keating Labor Governments.

The Workplace Relations Act adopts the framework of collective bargaining in the form of certified agreements (CA) and provides alternatives to collectivism in the form of individual employment agreements in the form of Australian Workplace agreements and gives recognition to other forms of agreement, vis common law agreements.

The fabric of decentralised industrial relations and collective bargaining was encapsulated in the Industrial Relations Reform Act, 1993 ('the Reform Act'). The key structural components of the Reform Act in relation to forms of industrial instruments were:

- Facilitation of bargaining and agreements to provide for two types of agreement, namely certified agreements (Section 170 MA) and enterprise flexibility agreements (Section 170 NA).
- Immunity from certain civil liabilities, a right to strike and a right by employers to lock out employees (Division 4 Section 170 PA) in the course of certain bargaining arrangements.
- Provision for boycott conduct sanctioned by the Act and not subject to proceedings under the Trade Practices Act. Restructuring the role of the Commission and the Court. This entails the establishment of a bargaining division under the Commission.

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The adoption of the no disadvantage test against which agreements were assessed to ensure that on balance employees were no worse off than they would have been by reference to the appropriate award. The establishment of awards as "safety net" conditions to protect the industrially weak.

Under the Reform Act the Australian Industrial Relations Commission was required to facilitate the conclusion of enterprise agreements and not, as had been the legislative framework prior to the Reform Act, to establish the terms and conditions of employment by arbitration. The Reform Act severely limited the ability of the Commission to intercede in the negotiation of agreements or indeed the tactics employed by the negotiating parties. Inclusion within the Reform Act of limited immunity from civil liability and the operation of the Trade Practices Act and the concept of protected industrial action had the effect of limiting both the ability of the effected employer and the Commission from instituting action which ameliorated the consequences on industrial action.

The Reform Act provided for a limited the employer response to industrial action in the form of a lock out having denied to it previous common law and statutory rights. The sceptics amongst us may be of the view that the Reform Act was written by the union movement for the union movement. The net result in relation to the negotiation of agreements in those industries where unions had an established role was that the protection afforded under the Reform Act to unions acting as a negotiating party were used to full and I would suggest damaging effect. The Workplace Relations Act variously came into effect from 31 December, 1996.

The key provisions of the Workplace Relations Act in relation to the negotiation of agreements are directed at:-

1. Providing employers with choices as to the form of industrial instrument to apply at the enterprise level.
2. Enhancing the employers ability to negotiate by pegging back the scope and content of Awards to twenty allowable award matters, matters incidental thereto and exceptional matters thereby expanding the scope of matters that may be negotiated.
3. Retaining the ability of negotiating parties to engage in protected industrial action but in so doing limiting the scope of industrial action.
4. Removing the rights of unions to participate "by right" in the negotiation of and being a party to certain forms of agreement, for example an Australian Workplace Agreement, and providing an ability to represent members where sought by the member but not otherwise.
5. Restoring civil liability and the application of the Trade Practices Act other than in relation to certain protected industrial action.
6. Limiting the ability of parties to Agreements to engage in industrial action during the term of an agreement to which they are a party.

The Workplace Relations Act recognises the following forms of agreement:

1. Enterprise agreements with registered trade unions in accordance with Sections 5A, 170LH and 170 LJ which must be certified by the Australian Industrial Relations Commission ('the Commission'). Employers need not be bound by an Award, State or Federal, as a precondition to entering into one or more of these forms of agreement as the power relied upon emanates from the corporations power of the Constitution.
2. Certified agreements directly with employees under Sections 5A, 170LH and 170LK. As in the case of 1 above such agreements must be certified by the Commission and need not be based upon the precondition of an applicable award.
3. Australian Workplace Agreements ('AWA's') directly with their employees under Sections 170VC, 170VF and 170VG. AWA's must be filed with and approved by the employment advocate.
4. Agreements made pursuant to Section 113A, that is, an agreement made pursuant to an enterprise flexibility provision of an Award. This includes Clause 20 agreements of the Coal Mining Industry (Production and Engineering) Interim Consent Award, 1990. This form of agreement will cease to be available with the

imminent review of the Act.

5. Common law employment contracts directly with employees. Viable common law agreements will need to contain provisions which are no less favourable than are provided by the relevant industry award.

ANALYSIS OF THE WORKPLACE RELATIONS ACT AND ITS PRACTICAL APPLICATION

The Reform Act structurally altered the Federal Industrial Relations System by diminishing the role of the Commission in the setting of employment conditions and in lieu thereof establishing a safety net of conditions. It marks the turning point in terms of the promotion of collective bargaining at the enterprise level and supports that system by enabling parties to the negotiation of a collective certified agreement to engage in protected industrial action.

In practical terms few enterprise flexibility agreements were concluded in the period from the enactment of the Reform Act in December, 1993 to its repeal in December, 1996.

Certified agreements on the other hand were entrenched across industry generally and covered the majority of unionised employees.

A significant feature of the Reform Act was that it promoted the role of unions.

In highly unionised industries, such as the coal mining industry, unions engaged in pattern bargaining and adopted a minimalist position to change.

That is, employers seeking to negotiate a certified agreement experienced intransigence to new ideas and resistance to change.

In the coal mining industry the content of certified agreements largely reflected the award but with lip service being given to concepts of continuous improvement, bench marking, best practice, etc.

In practically all cases agreements were negotiated through union offices and reflected a minimalist approach to collective bargaining. That is, the outcome of collective bargaining negotiations as reflected in the text of certified agreements is substantially restricted by union policies and are not what I would describe as enabling agreements".

In particular through the negotiation process coal mining industry unions evidenced an aversion to the following concepts in the context of negotiating certified agreements:-

- performance based remuneration systems;
- individual employee performance assessment;
- a reduction in total earnings which more reflects the economics of the individual employer;
- direct relationships between the employer and the individual employee;
- flexibility in roster systems remunerated as applied in other industries (e.g. metalliferous mines);
- methods of selecting which employees would be made redundant in the event of a need to do so;
- the role and relevance of seniority;
- trading off award entitlements (inclusive of reducing existing entitlements in lieu of other benefits);
- salary schemes and in particular salary packaging;

- changing the role of trade unions at the enterprise level;
- the abandonment of pre-existing work practices and manning of certain tasks;
- cross streams or indeed one class of employee paid differentially according to skills, competency, productivity;
- recruitment on the basis of merit and other than on the basis of union membership;

On the other side of the equation unions were particularly keen and successful in securing for their members at the workplace improved wages via increases in base rates, increases in coal bonus payments which over time have lost their true relationship to performance, increases in overtime rates, improved sick leave and annual leave payments.

These improved terms and conditions were generally negotiated for some improved flexibility and relaxation of pre-existing demarcations rather than fundamental change.

Some agreements purported to change the culture of the workplace and to adopt contemporary human resource principles.

My observation is that whilst the words of the Agreement may have supported those sentiments delivery of them at the coal face was far from satisfactory if not illusory.

The coal mining industry also experienced significant industrial action in the course of negotiating certified agreements.

Instead of protected industrial action being a tool of last resort, a number of coal mining unions regarded it as the virtual first port of call to soften up the employer.

As a consequence of the repeal of sections of the Trade Practices Act and the limitations placed on the Courts in relation to industrial torts, employers suffering industrial action were unable to access the Court system or indeed obtain orders from the Commission relieving them from the effects of the industrial action.

They were left with three options, sit it out, negotiate or lock out.

This predisposition to industrial action is no doubt a product of the confrontationalist industrial history of the industry and an exhibition of the lack of maturity of the negotiating parties operating under the new system.

As a consequence certified agreements were negotiated under threat or indeed actual industrial action which was not conducive to changing the culture of either employers or employees in the long term or indeed to coming to grips with the issues which affect the viability of the business.

The certified agreement option

This analysis leads me to ask; what is different under the Workplace Relations Act that may or could result in a different outcome to that previously experienced by employers ?

What has changed under the Workplace Relations Act which makes a certified agreement an attractive option to employers in the NSW coal mining industry!

Apart from providing employers with the option of negotiating directly with employees rather than via a union and perhaps the winding back of union preference provisions, I see that in a practical sense little has changed.

If an employer intends to negotiate a certified agreement with union involvement I venture to suggest that the outcome will be substantially the same as under the Reform Act.

Whilst certified agreements can be negotiated directly with employees unions have certain rights or representation. In a highly unionised industry it is unlikely that employees would negotiate without direct union involvement.

The negotiation of a certified agreement under the Workplace Relations Act is subject to the preparedness of employees in a collective sense and the Union movement to adopt change.

Substantially employee attitudes are moulded by Union policy which in New South Wales has been an impediment to achieving change.

A pre-condition to achieving change is therefore a preparedness by Unions to moderate their claims and facilitate structural change.

Where companies can point to change it comes at a price which has not worked to the best advantage of those Companies.

The Certified agreement option is however the least line of resistance option. It results in the employer "playing the game" and leaves open to unions the ability to set the agenda and participate in a industrial action, protected industrial action of course.

In the longer term Certified agreements are likely to be around for many years to come and encapsulated in industrial statutes, irrespective of the government of the day.

Should a Company select this type of industrial instrument there is every chance that they will achieve progressive change as changes occur within the union movement in relation to the role of unions in contemporary society.

Unions have changed and will continue to do so.

Consequently the scope of Certified agreements will change and will be an attractive option to some employers.

The Workplace Relations Act does however provide other alternatives.

Common law employment agreement option

Recognition under the Workplace Relations Act is given to common law agreements between an employer and the individual employee or perhaps groups of employees.

Individual common law employment contracts have been in existence well before centralised industrial relations systems and cover many employment relationships both in unionised and non unionised areas, most particularly in relation to technical, professional supervisory and clerical personnel.

Common law contracts have many attributes which include promoting direct dealing between the employer and the individual and flexibility.

A significant benefit of common law employment contract is that they are not subject to technical or complex legal procedures and may be varied by consent and/or terminated in response to changing circumstances.

Under a Common Law employment contract the parties may tailor a package which meets the needs of both the individual employee and the Company in relation to terms and conditions, pay structures, salary packaging, performance assessment, training, career planning, etc.

In practical terms common law employment contracts need to meet on balance the conditions that would otherwise apply to the individual.

A number of employers have succeeded in encapsulating within the text of the common law employment agreement provisions which address employment security, litigation both in relation to the employment relationship and in relation to common law/criminal law proceedings and discriminatory provisions which exist in the relevant Award.

A key to the success of the common law employment agreement is therefore that it not only meets the award as a minimum but contains mechanisms by which the employee may, with some confidence, have grievances resolved at no cost to the employee.

The difficulty with common law employment agreements is that where an award applies to the employee, award provisions cannot be technically off set and their efficacy in the face of employees or a union(s) seeking to negotiate a collective agreement has not been tested.

That is, the existence of common law employment agreements does not on the face of it provide a defence or protection from employees or unions seeking to negotiate a certified agreement or Australian Workplace Agreements and initiating bargaining a period and engaging in protected industrial action.

An employer that intends to rely upon common law employment agreements therefore runs the risk of having them overturned by subsequent collective action by employees and/or unions.

Ultimately the overall level of benefits contained in the common law agreement, the ability of the support structure to meet employee needs and the ability of union(s) to organise and raise the level of expectation for a better deal determines the viability of common law agreements.

One of the significant limiting factors in expanding the coverage of common law agreements is the lack of exposure to them by non technical, professional et al personnel to them and the existence of other alternatives, notably certified agreements.

For many common law employment contracts whilst attractive will not be achievable in the short to mid term unless other cultural and/or structural changes occur which instil them as an effective alternative to collective action or other industrial instrument options.

Agreements under the NSW Industrial Relations Act, 1996

Whilst provision exists under the Workplace Relations Act for recognition of agreements under the appropriate State Act, there appears little attraction in pursuing this option in lieu of others available under the Workplace Relations Act.

Provision is made for enterprise agreements under the Industrial Relations Act, 1996 NSW.

The form of such agreements differs marginally from that under the Federal system and the same tests apply.

Australian Workplace Agreement

Australian Workplace Agreements (AWA's) are a new form of agreement.

In substance AWA's are individual employment agreements between the employer and the employee.

A union cannot be a party to an AWA but may act as a bargaining agent for members and indeed non members. AWA's represent "the brave new world".

They rely both upon the corporations and industrial relations powers of the Constitution and under the Workplace Relations Act are subject to the same form of tests as apply to certified agreements.

An AWA is predominantly and employer generated document.

The negotiation of an AWA is a matter of choice. Neither the employer nor the employee is bound to negotiate on the document.

Parties to the negotiation of an AWA may engage in protected industrial action and are afforded the same immunity from prosecution as applies to parties negotiating a certified agreement.

The scope of an AWA is not limited other than it must address matters which relate to the employment relationship.

AWA's have a number of structural draw backs.

Firstly, experience would suggest that the turn around time between submitting the AWA to the employment advocate and receipt of the approval notice may amount to several months.

This time may be lessened by the employer presenting to the employment advocate a draft or pro forma agreement and

engaging in dialogue with the employment advocate as to difficulties with the content or procedure intended to be applied.

Secondly the negotiation of an AWA follows a strict course and is subject to legislative and bureaucratic procedures and tests.

In the absence of the employee being covered by an award (State or Federal) the employer must apply to the employment Advocate to nominate an appropriate Award.

Where the AWA is not being offered to all employees and on the same terms justification for this decision is required.

AWA's have a finite term and cannot be terminated prior to their nominal expiry other than by either party following an exhaustive and protracted procedure.

From a union perspective AWA's are "anti-union" as they do not institutionalise the role of unions in their negotiation or ongoing administration.

One of the features of an AWA is that an employee cannot be compelled to accept the terms offered.

From a positive perspective AWA's enable the employer to deal directly with individual employees and negotiate face to face rather than through a third party.

In addition the employer is able to encapsulate within the AWA contemporary human resource principles and concepts in very much the same way as is available to it under the common law employment agreement option.

AWA's are therefore likely to be attractive where the employer has developed a rapport with employees and has a mature industrial environment.

Where suspicion and mistrust abound there is unlikely to be the climate for individual agreements.

THE FUTURE OF THE VARIOUS FORMS OF AGREEMENT

From the analysis of the legislative framework it is clear that both Labor and Conservative governments have adopted a market orientation where the establishment of employment conditions at the enterprise level is a key and irreversible element.

Australia it would appear has shed the centralist approach to industrial regulation in lieu of enterprise regulation supported by statutorily set minimum safety net terms and conditions.

Trade union membership particularly in relation to staff has been on the decline for many years and increasingly employment conditions are being set at the enterprise or workplace level. The decline in union membership has been off set by an increase in the number of employees covered by common law employment agreements.

This trend is almost exclusively restricted to Staff but there have isolated instances in New South Wales where other mineworkers have elected to resign from their union.

I have suggested that the extension of common law employment contracts to non technical, professional, supervisory and clerical personnel requires a number of preconditions. Those preconditions are not evident at this time and therefore one can hardly expect a rush to adopt common law employment agreements.

One can reasonably expect that the incidence of common law employment agreements will continue to expand in that sector of the industry in which they are established and that conservative Governments may progressively amend legislation to give them greater recognition.

A future Federal Labor Government is unlikely to enact legislation which provides that common law employment agreements prevail over other forms of collective agreements but is also unlikely to legislate to remove their ability to exist.

The future of collective agreements must be assured either under future Labor or Conservative Governments as both parties have similar political platforms in relation to this form of industrial instrument.

What may change is the relative role of unions in the negotiation of collective agreements and the legislative protection afforded to negotiating parties.

The future of AWA's I would suggest is substantially in the lap of employers.

Should employers not adopt and effectively implement AWA's with the net result that their incidence is minimal, a future Labor government would have little difficulty or compunction in repealing that part of the Workplace Relations Act which provides for them.

If on the other hand they are an established form of industrial instrument at the time Labor next comes to power, the ability of a Labor Government to bring their existence to an end is far more difficult.

CONCLUDING REMARK

The future of industrial regulation is substantially in your hands.

APPENDIX 1

LEGISLATIVE FRAMEWORK

The Workplace Relations Act, 1996 (the 'Workplace Relations Act') is the first attempt by a Liberal/National Party coalition Government in more than twenty years to tackle the Federal industrial relations framework and to address the balance between the stakeholders subject to the Federal system.

From 1988 and prior to the enactment of the Workplace Relations Act changes to the Federal industrial relations system and regulation had occurred under the auspices of successive Labor Governments.

The Industrial Relations Act, 1988 and successive amending legislation was directed at shifting the role of the Australian Industrial Relations Commission away from arbitration to one of promoting direct dealings between parties, resolving disputes through conciliation and establishing minimum safety net employment conditions.

To appreciate the opportunities which present themselves today under the Workplace Relations Act we need to comprehend the structural changes which have occurred to the legislative framework, the thrust of those changes and their continuation and modification under the Workplace Relations Act.

We need also to assess the future legislative framework so that whatever form of industrial instrument we implement today is sustainable into the future.

Industrial Relations Reform Act, 1993

The Industrial Relations Reform Act, 1993 ('the Reform Act') was a key piece of legislation in this move.

The Reform Act sought to superimpose onto the Australian experience a form of collective bargaining which, until that time, was primarily associated with Continental America, and European countries and Governments whose history was influenced by those countries.

The major changes arising under the Reform Act were:

1. Establishment of statutory minimum employment conditions
2. Amendments to the Award system with the result that Awards were to provide a safety net which underpin direct bargaining
3. Facilitation of bargaining and Agreements to provide for two types of Agreement, namely Certified agreements (Section 170 MA) and Enterprise Flexibility Agreements (Section 170 NA).
4. Immunity from certain civil liabilities, a right to strike and a right by employers to lock out employees (Division 4 Section 170 PA) in the course of certain bargaining arrangements Provision for boycott conduct sanctioned by the Act and not subject to proceedings under the Trade Practices Act
5. Restructuring the role of the Commission and the Court. This entails the establishment of a bargaining division under the Commission.

For the purposes of this paper we do not develop point one above, vis minimum employment conditions, but in relation to this aspect the Reform Act generally codified principles relating to the dismissal of employees and encapsulated within the legislative framework International Labour Organisation Conventions.

Amendments to the Award system

In relation to Awards the Reform Act provided a conceptual basis whereby Awards would provide a safety net underpinning a system of collective bargaining wherein wages and other employment conditions would be set at the enterprise level.

To give effect to this intent the Reform Act establishes a separate Division of the Commission to manage and facilitate bargaining and the negotiation of workplace agreements.

The objects of this part of the Reform Act are to ensure as follows:

1. Employees are protected by Awards that set fair and enforceable minimum wages and conditions of employment
2. Awards act as a safety net underpinning direct bargaining
3. Awards are suited to the efficient performance of work according to the needs of the enterprise or industry while employees interests are also properly taken into account
4. Regard is had, in conjunction with making, reviewing and varying awards, to stable and appropriate relativities based on skill, responsibility and the conditions under which work is performed, and on the need for skilled based career paths
5. The Commissions functions and powers give employees prompt access to fair and enforceable minimum wages and conditions and encourages the prevention and settlement of industrial disputes by the making of enterprise agreements.

Importantly the content and scope of Award provisions was not limited or prescribed by statute.

In the exercise of its powers and role the Commission was required to rely as far as practicable on conciliation and to consider, in dealing with matters, the interests of the parties and the Australian community as a whole.

The Reform Act required in effect that the Commission promote enterprise flexibility and enterprise efficiency and in so doing guard against provisions which reduce employee conditions, or where so affected is not against the public interest.

Promotion of bargaining and facilitation of agreements

The Reform Act provided for two types of Enterprise Agreement being Certified agreements (Part VIB Division 2) and Enterprise Flexibility Agreements (Part VIB Division 3).

Certified agreements may have been made in response to an industrial dispute or an industrial situation.

Enterprise Flexibility Agreements were Agreements made directly between the employer and its employees. Such Agreements did not require union involvement however an eligible union had rights to represent the interest of members and, should it so choose, be a party to the Agreement.

The ability of the Reform Act to cover enterprise Flexibility Agreements arose from reliance on the corporations power of the Constitution and required that the employer must be a constitutional Corporation to enter into such an Agreement.

The Reform Act establishes certain tests to ensure that parties covered by either Certified agreements or Enterprise Flexibility Agreements are not disadvantaged in respect their terms and conditions of employment.

The no disadvantage test is an "on balance" test taking the Agreement as a whole, not term by term and is applied having regard to the Award applicable to the employees.

Immunity from Civil Liability

Division 4 of the Reform Act gives effect to what are stated to be international obligations to provide for a right to strike and legislative protection for the exercise of that right subject to certain limitations.

In relation to parties negotiating a Certified agreement, Section 170 of the Reform Act provided for the right to strike where:

1. there exists an industrial dispute involving an employer and one or more organisations members of which are:
 - employed by the employer to perform work in a single business, part of a single business or a single place of work; and
 - are covered by an Award; and
2. the employer and one or more of those organisations are negotiating an

Agreement under Division 2 Part VIB

Procedurally an industrial dispute must exist and one of the negotiating parties had initiated a bargaining period (minimum of 7 days) and given the requisite notice (72 hours) of the intention to engage in protected industrial action (Section 170 PG) as contained in a notice to the other party on a specified date(s).

Providing all the requisite steps have been followed and the parties have, before engaging in industrial action, negotiated in good faith, either party could engage in industrial action which was protected under the Reform Act. The action however must be directed at advancing claims made against the other party pursuant to concluding a Certified agreement.

The termination of industrial action other than by action of the parties may be brought about by action of the Commission, that is to terminate or suspend the bargaining period (Section 170PO). Where the Commission terminates the bargaining period it is obliged to arbitrate and make an Award for a fixed period.

The ability of negotiating parties to a Certified agreement to engage in protected industrial action and enjoy immunity from civil proceedings is supported by general legislative changes which repeal Section 45E and alter Section 45D of the Trade Practices Act.

The Reform Act in relation to Section 45D of the Trade Practices Act provided that in determining whether Section 45 D(1) of that Act had been breached certain conduct, termed 'boycott conduct' would be disregarded.

Included in that category were:

- a boycott contravention
- attempting to commit a boycott contravention
- aiding, abetting, counselling or procuring a person to commit a boycott contravention
- inducing, or attempting to induce a person (whether by threats, promises or otherwise) to commit a boycott contravention
- conspiring to commit a boycott contravention.

Conduct that was protected under the Reform Act extended to persons/organisations (unions and employees of the employer) who engaged in such action where the ultimate purpose of the conduct was substantially related to:-

- the remuneration, conditions of employment, hours of work or working conditions of the employee(s) working for that employer; or
- relates to the termination or action directed to the termination of a person employed by that employer.

In addition to the protection otherwise afforded, Section 164 provided immunity from prosecution under a State or Territory law and Section 166A provided that Tort action did not lie against an officer of a union or employee engaged in action in furtherance of claims that were the subject of an industrial dispute relating to the negotiation of a Certified agreement.

Restructuring the commission and the court

The Reform Act restructured the Commission and the Industrial Court system.

In relation to the Commission the Reform Act created a Bargaining Division whose functions as previously discussed relate to the negotiation of Agreements.

In relation to the Court structure the Reform Act established a new Federal Court, the Industrial Relations Court Australia. This Court with supportive Judicial Registrars was given certain powers previously exercisable by the High Court and original jurisdiction in relation to such matters as boycott conduct, industrial action, lock outs, etc.

A major role of the Judicial Registrars and the Court related to employment termination proceedings.

The Workplace Relations Act, 1996

The Workplace Relations Act, 1996 ('the Workplace Relations Act') was assented to on 25 November, 1996 and variously came into operation from 31 December, 1996.

In many respects it builds upon the concepts developed in the Reform Act but in so doing attempts to redefine the power of Unions and employers in the bargaining process and the protection afforded to negotiating parties.

The Workplace Relations Act has been called many things.

One view is that the legislation is "pro choice" adopting a legislative framework which seeks to facilitate the negotiation of Agreements and enhance flexibility at the enterprise level.

The explanatory note accompanying the Workplace Relations and Other Legislation Amendment Bill states as follows:-

- "legislative reforms are directed at supporting a more direct, co operative relationship between employers and employees and greater labour market flexibility." And
- "the Act is framed to give primary responsibility for industrial relations and agreement making to employers and employees at the enterprise and workplace levels." and
- "the industrial relations system needs to provide them with effective choices about arrangements which suit their particular circumstances. The Act provides such choice as well as a fair go for all."

The objects of the Workplace Relations Act state that the principal object of the Act is to provide a framework for co-operative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

1. encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and
2. ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and
3. enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by the Act;

4. providing the means:
 - for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards;
 - to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment;
5. providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement making and ensures that they abide by Awards and Agreements applying to them;
6. ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association;
- 7.
8. enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration;
9. assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers;
10. respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex ,etc; and

assisting in giving effect to Australia's international obligations in relation to labour standards".

From these objects it is clear that the Workplace Relations Act whilst adopting many concepts from the Reform Act places greater emphasis upon the direct relationship between the employer and employees rather than promoting the role of third parties, vis trade unions and employer organisations.

The Workplace Relations Act continues the process of redefining the role of the Commission and the Court commenced under the Reform Act.

In relation to Award making, the Workplace Relations Act restricts the subject matter that the Commission can arbitrate following the finding of an industrial dispute.

The scope on an industrial dispute and the matters that the Commission may arbitrate, other than in relation to an arbitration following the termination of a bargaining period under Part VIB Division 8 Section 170 MW(3) or (7), are defined by Section 89 A and limited to twenty allowable matters, matters incidental thereto and to exceptional matters.

In relation to the matters subject to arbitration under Section 170 MX following the Commission terminating a bargaining period, the Commission is not so restricted or limited to matters defined in 89A but may deal with all matters (Section 170MY) the subject of dispute between the parties.

The Award making function of the Commission is restricted to making minimum rates Awards and to establishing safety net wages and conditions.

It is a clear intention of the Act to prune back Award provisions so as to provide greater scope of provisions that may be negotiated at the enterprise level. To that end one of the roles of the Commission is to review Awards for the purpose of removing non allowable matters.

This is important in the context of agreements contemplated under the Workplace Relations Act in that these struck out Award provisions are available to be incorporated in forms of agreements envisaged under the Workplace Relations Act. The proviso being that they do not offend Part XA of the that Act.

The Workplace Relations Act is primarily directed towards promoting the implementation of workplace or enterprise agreements.

The use of different legislative powers pervades the various forms of agreement Constitutional Corporations ('employer') may enter into. Other than State Awards (or employment agreements made under the appropriate State industrial relations legislation) or Federal Awards, an employer may enter into and regulate employment conditions by one or more of the following forms of agreement:

1. Enterprise agreements with registered trade unions in accordance with Sections 5A, 170LH and 170 LJ which must be certified by the Australian Industrial Relations Commission ('the Commission'). Employers need not be bound by an Award, State or Federal, as a precondition to entering into one or more of these forms of agreement as the power relied upon emanates from the Corporations power of the Constitution.
2. Certified agreements directly with employees under Sections 5A, 170LH and 170LK. As in the case of 1 above such agreements must be certified by the Commission and need not be based upon the pre-condition of an applicable award.
3. Australian Workplace Agreements (AWA's) directly with their employees under Sections 170VC, 170VF and 170VG.
AWA's must be filed with and approved by the Employment Advocate.
4. Agreements made pursuant to Section 113A, that is, an agreement made pursuant to an enterprise flexibility provision of an Award. This includes Clause 20 agreements of the Coal Mining Industry (Production and Engineering) Interim Consent Award, 1990. This form of agreement will cease to be available with the imminent review of the Act.
5. Common Law employment contracts directly with employees. Viable Common law agreements will need to contain provisions which are no less favourable than are provided by the relevant industry award.

These forms of agreement are the basis upon which the Workplace Relations Act seeks to regulate workplace relations with Awards assuming the role of setting safety net minimum wages and conditions rather than being all encompassing and prescribing, supposedly, the maximum terms and conditions of employment.

By comparison with the former Industrial Relations Act, 1988 the new Act permits:

1. Companies to enter into collective Certified agreements directly with employees rather than through the auspices of the Union. Whilst this provision existed under the previous Act it has been developed so as to extend the choices available;
2. Companies to enter into individual employment agreements directly with an employee or groups of employees without union intervention. Note this relates to parties to agreements not the ability of a union to act as a bargaining agent for a member;
3. Companies to enter into Common Law employment contracts. Previously whilst available to employers such agreements were not recognised under the industrial law. The Act now gives limited recognition to them.
4. State agreements or awards prevailing over Federal agreements or awards

Each form of agreement is subject to certain tests, notably the no disadvantage test, Part VIE, Section 170XA and meeting minimum statutory requirements.

The changes to types of Agreement available and recognition of Common Law Agreements was accompanied under the Workplace Relations Act by a restoration of the industrial Torts, common law action and the full application of the Trade Practices Act other than in relation to parties negotiating a Certified agreement or an Australian Workplace Agreement where qualified protection exists.

The Workplace Relations Act retained the concept of protected industrial action and extended it to parties negotiating both Certified agreement and Australian Workplace Agreements. Other industrial action is, for the purposes of the Workplace Relations Act, illegal and unprotected.

The primary thrust of the Act in relation to the form of agreement to be implemented at the particular enterprise is directed at enabling the employer to be the activator of choice, not a union and not employees.

The Act achieves this by relying upon the Corporations powers under the Australian Constitution (Section 51 (xx)) in addition to the powers to the labour powers (Section 52 (xxxv)).

The use of the Corporations power is not novel in the industrial relations context and indeed the availability of Enterprise Flexibility Agreements under the Reform Act relied upon the this Constitutional power.

By utilising the joint labour and corporations powers the Act provides a vehicle to implement change at the enterprise level from that previously available under the Industrial Relations Act, 1988 and the Reform Act.

The Workplace Relations Act places an employer under no compulsion or obligation to agree to negotiate any agreement or indeed any particular form of agreement.